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Hurricane Warning Flag for Olympic Sports: Compliance Practices in *Biediger v. Quinnipiac University* Signal a Risk to Women's and Men's Olympic Sports

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HURRICANE WARNING FLAG FOR OLYMPIC SPORTS: COMPLIANCE PRACTICES IN *BIEDIGER V. QUINNIPIAC* UNIVERSITY SIGNAL A RISK TO WOMEN'S AND MEN'S OLYMPIC SPORTS

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Abstract: The NCAA has had an uneven and sometimes rugged history in its relationship with the role and advancement of women in athletics. To its credit, the organization has shifted from being a perpetuator of outmoded stereotypes to being an effective advocate for Title IX, most notably during the Bush administration. Title IX scuffles have instead moved to private groups or individual schools. Recent litigation against Quinnipiac University reveals how some schools have tried to cut costs by cheating women out of genuine sports experiences. But the litigation is more than just another Title IX case: it captures the fissures created by the ongoing arms races among Division I athletic departments and the pressures on both women's and men's Olympic sports. Division I, the richest, smallest division, remains the lone division recording a net loss in numbers of men's athletic teams. Although money continues to flow into athletic departments at an extraordinary pace, growth is concentrated in only two sports: football and men's basketball. These budget trends, which affect the quantity and quality of women's sports, are a warning flag to men's Olympic sports, whose programs are likely to become the next target for elimination or paring as the two-sport arms races continue.

INTRODUCTION

Title IX, as it applies to athletics, enjoys enthusiastic support around the country.¹ Yet there are still voices that contest the premise of

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¹ The results of a recent Mellman poll of over 1000 U.S. citizens, conducted by the National Women's Law Center (NWLC), showed that approximately 80% of men, women, Democrats, Republicans, independents, and people with and without children all supported Title IX. See Memorandum from The Mellman Group on Title IX to Interested Parties 1 (June 14, 2007), *available at* www.fairplaynow.org/TitleIXpollresults.pdf; *see also* Letter from Jocelyn Samuels, Vice President for Educ. & Emp't Opportunities, NWLC, to NWLC Supporters (June 2008), *available at* http://action.nwlc.org/site/MessageViewer?em_id=2721.0.

equality. The National Collegiate Athletic Association's (NCAA) formal support for Title IX and its implementing regulations² has shifted the resistance from that organization to other private groups. The time may have come for Title IX advocates and men's Olympic sports³ advocates to join forces, in an effort to preserve the laudable educational mission of athletics.⁴ Given the new budgetary trends in college sports generally, and recent litigation involving women's sports, men's Olympic sports should be supportive of efforts to prohibit colleges and universities from disreputable practices that currently provide some female athletes with sub-par, "varsity-lite" sports experiences. If collective action is not forthcoming, men's Olympic sports will be next to suffer the same fate, as the recent budgetary trend is to shift funds toward sports like football and

² See 34 C.F.R. § 106.41 (2010). The 1975 regulations with regard to sports require institutions to provide male and female students with the following: (1) equal opportunities to participate in sports; (2) an equitable allocation of scholarships monies; and (3) equitable treatment in all aspects of athletics, including coaching, facilities, equipment, medical treatment, travel, and support, among other things. See *id.* The 1979 Policy Interpretation set forth three wholly independent ways for schools to demonstrate that students of both genders have equal opportunities to participate in sports: (1) the percentage of male and female athletes is substantially proportionate to the percentage of male and female students enrolled in the school (the "proportionality test" or "Prong 1"); or (2) the school has a history and a continuing practice of expanding opportunities for female students because their gender is usually the one excluded from sports ("Prong 2"); or (3) the school is fully and effectively meeting its female students' interests and abilities to participate in sports, and competition exists within the school's competitive region ("Prong 3"). See Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979) [hereinafter Title IX Policy Interpretation]. If a school meets any one of these tests, it is in compliance with Title IX's participation requirement. See *id.*

³ This Article refers to all college sports except football and men's basketball as "Olympic sports" rather than the misleading term "non-revenue sports." Almost all sports generate some revenue, but very few generate a profit. See JAY WEINER, KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, COLLEGE SPORTS 101, at 11–12 (2009) [hereinafter COLLEGE SPORTS 101], available at <http://www.knightcommission.org/images/pdfs/cs101.pdf>. Others use the terms "major" and "minor" sports; the problem with these terms is that at some schools, the "major" sport may be ice hockey or lacrosse. The terms "American collegiate 'arms race' sports" and "non-arms race sports" would also capture the distinction.

⁴ See ELLEN STAUROWSKY ET AL., WOMEN'S SPORTS FOUND., HER LIFE DEPENDS ON IT II: SPORT, PHYSICAL ACTIVITY, AND THE HEALTH AND WELL-BEING OF AMERICAN GIRLS AND WOMEN 48 (2009). In this report, the authors explain that, contrary to the "dumb jock" myth, interscholastic sports participation provides both boys and girls from diverse socioeconomic, racial, and ethnic backgrounds measurable positive educational impacts, including improvements in self-concept, higher educational aspirations in the senior year, improved school attendance, increased math and science enrollment, more time spent on homework, and higher enrollment in honors courses. See *id.* at 49. A sports experience changes the health trajectory of a girl, including her risk for obesity, heart disease, breast cancer, osteoporosis, tobacco and drug use, unwanted teen pregnancy, sexually transmitted diseases, depression, and suicide. See *id.* at 13–15, 28, 32–33, 37.

men's basketball. Moreover, because Title IX derives its power to provide girls and women with athletics programming from a robust lineup of men's teams—the requirements for women's teams are linked to existing offerings for men—it makes sense for women's advocates to insist that schools provide men's Olympic sports with quality sports experiences, on educational grounds, irrespective of civil rights laws.

Part I of this Article discusses how the NCAA, despite its initial reluctance, has evolved into an advocate for gender equality.⁵ Part II then examines budget trends at NCAA schools as a window into the expanding budgets associated with the athletics arms race and the pressures to cut corners within these programs.⁶ Finally, Part III concludes that these trends suggest that men's Olympic sports are likely the next target of these same pressures to cut corners, as universities attempt to compete in the arms race.⁷

I. THE NCAA'S TRANSFORMATION INTO A GENDER EQUITY ADVOCATE

In the one hundred years since the NCAA was founded, the biggest changes to the public face of athletics departments has probably been the wholesale inclusion of women.⁸ It has not been an easy assimilation for women, and, as this Article describes, realizing the spirit of the gender equity laws continues to be difficult. For the first seventy years of its existence, the NCAA exclusively represented men. But even by the early 1970s, the NCAA could see change coming; it was becoming involved in lawsuits for violating women's rights under the Fourteenth Amendment, which provides for equal protection under the law.⁹ After the passage of Title IX, and with the specter of major growth in women's athletics on the horizon, the NCAA tried mightily to avoid

⁵ See *infra* notes 8–42 and accompanying text.

⁶ See *infra* notes 43–134 and accompanying text.

⁷ See *infra* notes 135–146 and accompanying text.

⁸ For extensive histories of women in sport, see generally, e.g., SUSAN K. CAHN, *COMING ON STRONG: GENDER AND SEXUALITY IN TWENTIETH-CENTURY WOMEN'S SPORT* (1994); MARY JO FESTLE, *PLAYING NICE: POLITICS AND APOLOGIES IN WOMEN'S SPORTS* (1996); NANCY HOGSHEAD-MAKAR & ANDREW ZIMBALIST, *EQUAL PLAY: TITLE IX AND SOCIAL POLICY* (2007); ALLEN L. SACK & ELLEN J. STAUROWSKY, *COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH* (1998).

⁹ See, e.g., *Blair v. Wash. State Univ.*, 740 P.2d 1379, 1380 (Wash. 1987) (involving a lawsuit brought by female athletes and their coaches at Washington State University alleging sex discrimination).

the application of Title IX to athletics departments and its membership, both in Congress¹⁰ and the courts.¹¹ These efforts all failed.¹²

By 1980, it became clear that women's sports would grow in numbers and stature, and also thereby require the dedication of significant resources. After the NCAA failed to weaken the Title IX laws, in 1982 the organization consolidated its power as the singular voice for university athletics by combining with the Association for Intercollegiate Athletics for Women (AIAW), an organization born from the physical education departments in colleges and universities.¹³ The new consolidated organization did come with a compromise from the NCAA: the association agreed it would cease its efforts to thwart the goals of gender equity in athletic departments.¹⁴

The NCAA has made good on its agreement. Not only has it passed the Hippocratic Oath test—it has not harmed women by taking stands against women's sports participation—it has also become a powerful ally for Title IX and women's rights within athletics. In fact, in 1992, the NCAA created the Committee on Women's Athletics and adopted *Operating Principle 3.1, Gender Issues*, which advances a commitment to demonstrating fair and equitable treatment of both men and women.¹⁵ The organization also began to require a gender-equity audit as part of a Division I school's decennial certification process.¹⁶ The gender-equity component requires a member institution to "[d]emonstrate that it is committed to, and has progressed toward, fair and equitable treatment

¹⁰ See Tower Amendment, 120 CONG. REC. 15, 322–23 (1974) (statement of Sen. John Tower). On May 24, 1974, Senator Tower proposed an amendment that would exempt sports that produced gross revenue or donations from having to comply with Title IX. See *id.* This proposal was rejected. *Title IX Legislative Chronology*, WOMEN'S SPORTS FOUND., <http://www.womenssportsfoundation.org/Content/Articles/Issues/History/T/Title-IX-Legislative-Chronology.aspx> (last visited Mar. 18, 2011). For a discussion of the legislative history of the regulations interpreting Title IX, see Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 MARQ. SPORTS L. REV. 11, 12–18 (2003).

¹¹ See *NCAA v. Califano*, 444 F. Supp. 425, 425 (D. Kan. 1978) (sustaining a motion to dismiss in favor of the Department of Health, Education, and Welfare in a suit brought by NCAA).

¹² See HOGSHEAD-MAKAR & ZIMBALIST, *supra* note 8, at 108–96.

¹³ See WELCH SUGGS, *A PLACE ON THE TEAM* 47 (2005).

¹⁴ For a thorough discussion of the evolution of the relationship between women and the NCAA, see *id.* at 13–31 and HOGSHEAD-MAKAR & ZIMBALIST, *supra* note 8, at 9–55.

¹⁵ See DIV. I COMM. ON ATHLETICS CERTIFICATION, NCAA, MEASURABLE STANDARDS FOR OPERATING PRINCIPLE 3.1: GENDER ISSUES 2 (2008), available at <http://ncaacertification.wisc.edu/docs/3.1-Gender-Issues.pdf>.

¹⁶ See NCAA, 2006–2007 DIVISION I ATHLETICS CERTIFICATION HANDBOOK 36 (2006), available at <http://www.ncaapublications.com/productdownloads/D1AC07.pdf>.

of both male and female student-athletes and athletics department personnel.”¹⁷ In theory, the institution has to provide an explanation if the prior plan was not followed or was otherwise ignored.¹⁸

Then, in 1994, the NCAA enacted guidelines for identifying “emerging sports” so that athletics departments would coordinate the adoption of new women’s sports and thus ensure robust competition between schools.¹⁹ This coordination encouraged schools to increase sports opportunities and create NCAA championships in these new sports. Women’s collegiate crew, for example, had grown enough to merit a Division I NCAA championship by 1997.²⁰

In addition, in 1995, the NCAA began hosting Title IX seminars.²¹ The seminars were designed to provide technical assistance and educa-

¹⁷ See *id.* at 27.

¹⁸ Although the requirement to demonstrate a commitment to gender equity is certainly laudable, the NCAA has not yet found a violation of its own rules, even when those same schools were found by courts to be in violation of Title IX. See *Mansourian v. Bd. of Regents of the Univ. of Cal. at Davis*, No. CIV. S 03-2591 FCD EFB, 2010 WL 5114918, at *11–13 (E.D. Cal. Dec. 8, 2010) (holding that individual defendants were personally liable for a constitutional deprivation of equal rights when, in a position of authority, they cut plaintiff-athletes from sports participation during a time of contraction, demonstrating a “callous indifference” towards plaintiff-athletes); see also *id.* at *1 n.7 (noting plaintiffs were required to submit NCAA certification paperwork).

¹⁹ See *NCAA Emerging Sports Timeline*, NCAA, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/about+the+ncaa/diversity+and+inclusion/gender+equity+and+title+ix/es+-+history (last visited Feb. 2, 2011) (“When the NCAA adopted the recommendations of its Gender-Equity Task Force in 1994, one of the recommendations was the creation of the list of emerging sports for women.”).

²⁰ See Beth Rosenberg, ‘Emerging-Sports’ Idea Has Yielded Championship Results, NCAA NEWS, Apr. 26, 2004, <http://fs.ncaa.org/Docs/NCAANewsArchive/2004/Association-wide/emerging-sports+idea+has+yielded+championship+results+-+4-26-04.html> (“Rowing was the first emerging sport to gain championship status. Division I conducted the first championship in 1997 . . .”).

²¹ See *NCAA Gender Equity*, NCAA, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/About+The+NCAA/Diversity+and+Inclusion/Gender+Equity+and+Title+IX/homepage.html (last visited Feb. 17, 2011); see also *NCAA Gender Equity Resources*, NCAA, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/About+The+NCAA/Diversity+and+Inclusion/Gender+Equity+and+Title+IX/NCAA+Gender+Equity+Resources (last visited Feb. 17, 2011). The seminars are now termed “Gender Equity Seminars” and include a broader range of topics, including pregnancy, sexual harassment, sexual orientation discrimination, health issues for female athletes, and employment in athletics. See *NCAA Gender Equity Forum*, NCAA, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/about+the+ncaa/diversity+and+inclusion/gender+equity+and+title+ix/ncaa+gender+equity+for+um+home+page (last visited Feb. 17, 2011).

tional resources to assist schools in understanding Title IX and its requirements.²²

Further demonstrating the NCAA's commitment to this goal, some of the NCAA's highest awards have gone to persons who dedicated the better part of their professional careers to gender equity.²³

This recent history is not to suggest that all of college athletics has been uniformly supportive of Title IX. The reality is far from it. Challenges to Title IX, though, have come from external organizations and individual schools rather than from the NCAA itself. In 1993 and again in 1995, the College Football Coaches Association and other groups lobbied Congress to try to amend and weaken Title IX.²⁴ When these efforts failed, other groups like the National Wrestling Coaches Association²⁵ and the College Sports Council²⁶ sued the government to challenge Title IX. Individual teams also turned to the courts to challenge the decisions of some schools to decrease opportunities for males rather than increase opportunities for females. Courts universally rejected these challenges, finding that men, as a class, were over-represented in the athletics department.²⁷ Courts held that schools can offer athletic programs of any size they choose so long as they allocate their opportunities

²² See Ellen J. Staurowsky, *Title IX and College Sport: The Long Painful Path to Compliance and Reform*, 14 MARQ. SPORTS L. REV. 95, 102 n.36 (2003).

²³ See *id.* The NCAA's highest honor, presented each year to a distinguished citizen of national reputation and outstanding accomplishment, was awarded to Donna de Varona in 2003. *NCAA Theodore Roosevelt Award Recipients*, NCAA, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/Media+and+Events/Awards/Honors+Program/Theodore+Roosevelt/winners.html (last visited Feb. 17, 2011). The Gerald Ford Award honors an individual who has provided significant leadership as an advocate for intercollegiate athletics on a continuous basis over the course of their career. *Id.* The award has gone to such notables as Billie Jean King in 2009, James Frank in 2008, and Christine Grant in 2007; in 2006, the winner was Birch Bayh, the Senate sponsor of Title IX. *Id.*

²⁴ See Diane Heckman, *On the Eve of Title IX's 25th Anniversary: Sex Discrimination in the Gym and the Classroom*, 21 NOVA L. REV. 545, 650 (1997).

²⁵ See, e.g., Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 383 F.3d 1047, 1047 (D.C. Cir. 2004) (considering a suit brought by wrestling organizations, after certain universities eliminated men's varsity wrestling programs, to challenge the three-part test enunciated in the 1979 Policy Interpretation and 1996 Clarification).

²⁶ See, e.g., Coll. Sports Council v. Dep't of Educ., 465 F.3d 20, 22 (D.C. Cir. 2007) (considering a suit brought by organizations representing male athletes, alumni, and coaches challenging Title IX rules and implementing policies).

²⁷ See, e.g., Miami Univ. Wrestling Club v. Miami Univ. of Ohio, 302 F.3d 608, 615–16 (6th Cir. 2002); Chalenor v. Univ. of N.D., 291 F.3d 1042, 1046, 1050 (8th Cir. 2002); Neal v. Bd. of Trustees of the Ca. State Univs., 198 F.3d 763, 767 (9th Cir. 1999); Boulahanis v. Bd. of Regents of Ill. State Univ., 198 F.3d 633, 637 (7th Cir. 1999); Kelley v. Bd. of Trustees, 35 F.3d 265, 269–70 (7th Cir. 1995).

equitably between male and female students.²⁸ Women's groups commended the courts' affirmation of a strong Title IX law but did not celebrate the loss of men's teams. Nonetheless, such a solution was necessary; if the courts had instead concluded that schools could not cut a men's sport while men were still over-represented in the athletics department, the courts would have given schools a powerful weapon against providing equity to women's athletics.

NCAA advocacy for women's sports was most evident during the Bush administration and the 2003 Commission on Opportunities for Athletics (the "Commission"), and the short-lived 2005 Model Survey. The Commission was officially charged with collecting information, analyzing issues, and obtaining broad public input directed at improving the application of current federal standards for measuring equal opportunity for men and women to participate in athletics under Title IX.²⁹ Few were fooled by this transparent charge for "improvement." It was apparent from the outset that the Commission was intent on making the case to weaken Title IX.³⁰ The NCAA Executive Committee, and Myles Brand in particular, constantly reiterated unwavering support for existing gender equity policies.³¹ After a yearlong attempt to weaken the law, the Department of Education ultimately released a letter in 2003 entitled "Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance,"³² which—rather

²⁸ See, e.g., *Miami Univ. Wrestling Club*, 302 F.3d at 615–16; *Chalenor*, 291 F.3d at 1046; *Neal*, 198 F.3d at 766–67; *Boulahanis*, 198 F.3d at 638; *Kelley*, 35 F.3d at 270.

²⁹ See SEC'y OF EDUC.'S COMM'N ON OPPORTUNITY IN ATHLETICS, "OPEN TO ALL": TITLE IX AT THIRTY 1 (2003), available at <http://www.ed.gov/about/bdscomm/list/athletics/title9report.pdf>.

³⁰ For a thorough discussion of the Commission and the inherent risk to Title IX, see Staurowsky, *supra* note 22, at 106–09.

³¹ See, e.g., Myles Brand, President, NCAA, Keynote Address at the NCAA Title IX Seminar (Apr. 28, 2003), available at http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/About+The+NCAA/ (follow "Diversity and Inclusion" hyperlink; then follow "NCAA Title IX Resource Center" hyperlink; then under "Statements and Speeches by President Myles Brand" follow "Title IX Seminar Keynote Address" hyperlink) ("Why would it be that athletics—which embraces the concepts of fair play, teamwork, grace under pressure—would be one of the remaining areas of resistance to equity for men and women in higher education? The answer we can attest to with certainty is that the blame does not rest with Title IX."); Libby Sander, *Myles Brand, First College President to Lead NCAA, Dies at 67*, CHRON. HIGHER EDUC. (Sept. 16, 2009), <http://chronicle.com/article/Myles-Brand-First-College-/48457/> ("[President Brand] felt the love. It came from advocates of gender equity, who were appreciative of the NCAA's outspoken support for Title IX, the federal law banning sex discrimination at institutions receiving federal funds.").

³² See "Dear Colleague" Letter from Gerald Reynolds, Ass't Sec'y for Civil Rights, Office for Civil Rights (OCR), U.S. Dep't of Educ. (July 11, 2003), available at <http://www2.ed.gov/about/offices/list/ocr/title9guidanceFinal.html>.

than weaken the law—strengthened it. The 2003 Further Clarification reaffirms the validity and effectiveness of longstanding administrative regulations and policies governing this application.

Just two years later, on March 17, 2005, the Department of Education issued a new Title IX policy,³³ this time without Commission or public input. This new policy, referred to here as the “2005 Additional Clarification,” was structured in a way that weakened the gender equity laws by authorizing a “Model Survey” that purported to gauge female students’ interest in athletics based on the results of what was essentially a seriously flawed methodology, and thereby limited athletic opportunities.³⁴

The 2005 Additional Clarification and Model Survey were heavily criticized.³⁵ The survey’s flaws are extensive, but its most glaring failings were probably its methodology of administration via email and its default presumption that no response was to be accepted as non-interest.³⁶ It also required students to have elite experience in athletics, and it restricted the survey to enrolled and admitted students.³⁷ These deficiencies practically guaranteed that high schools and universities would have biased results and thus would have no reason to maintain or add teams for women based on their responses, thereby enabling

³³ See “Dear Colleague” Letter from Russlyn Ali, Ass’t Sec’y for Civil Rights, OCR, U.S. Dep’t of Educ. (Apr. 20, 2010) (referencing the 2005 policy) (“With this letter, the Department is withdrawing the ‘Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—Part Three’ (2005 Additional Clarification) and all related documents accompanying it . . .”). For an explanation of the evolution of this policy, see Allison Williams, *Title IX—Tipping the Scales of Equality*, 1 U. DENV. SPORTS & ENT. L. J. 1, 10–11 (2005).

³⁴ See DON SABO & CHRISTINE H.B. GRANT, CTR. FOR RESEARCH ON PHYSICAL ACTIVITY, SPORT & HEALTH, D’YOUVILLE COLLEGE, LIMITATIONS OF THE DEPARTMENT OF EDUCATION’S ONLINE SURVEY METHOD FOR MEASURING ATHLETIC INTEREST AND ABILITY ON U.S.A. CAMPUSES 4–6 (2005), available at http://www.dyc.edu/crpash/limits_of_online_survey.pdf.

³⁵ See, e.g., *id.*; Erin Buzuvis, *Survey Says . . . A Critical Analysis of the New Title IX Policy and a Proposal for Reform*, 91 IOWA L. REV. 821, 837 (2006); Robin Preussel, *Successful Challenge, Ruling Reversed: Why the Office of Civil Rights’ Survey Proposal May Be Well-Intended but Misguided*, 13 SPORTS LAW. J. 79, 117–20 (2006); Letter from Lisa M. Maatz & Jocelyn Samuels, Nat’l Coal. for Women & Girls in Educ., to Margaret Spellings, U.S. Sec’y of Educ. (Mar. 28, 2005), available at <http://www.ncwge.org/PDF/TitleIX-Spellings.pdf>; Nancy Hogshead-Makar & Donna Lopiano, *Foul Play: Department of Education Creates Huge Title IX Compliance Loophole*, BARNARD’S SCHOLAR & FEMINIST ONLINE (Summer 2006), http://www.barnard.edu/sfonline/sport/wsf_01.htm.

³⁶ Preussel, *supra* note 35, at 118.

³⁷ *Id.* at 119 n.207, 120–22.

schools to evade the law's requirement of providing equal sports opportunities to women and girls.³⁸

Again, the NCAA Executive Committee's swift and strong stance against the Model Survey compliance option³⁹ kept the survey from being widely adopted during the committee's reign.⁴⁰ In April 2010, the Department of Education ultimately withdrew the 2005 Additional Clarification and returned to standards adopted in 1996 for demonstrating compliance under Prong 3.⁴¹

³⁸ The survey's restriction to enrolled and admitted students ignored the reality that most student athletes are recruited, or, at the very least, that students self-select based on what a school is offering. As a matriculating freshman and 1980 Olympian, for example, the author would not have applied to Duke University if it did not have a swimming program. Athletes are rarely recruited from within the existing student body; usually, they are recruited from the region or country at large. It is no accident that Duke has seven-foot-tall basketball players walking the halls. The school spends enormous resources to make sure that it attracts the top talent from all over the country. At the high school level, a coach finds students with and without experience or skill who are big enough or fast enough to try out for the team. But under the 2005 Model Survey, a college that affirmatively recruited male athletes from all over the country could have eliminated its obligation to do the same for female athletes if female students failed to receive or respond to an email survey. *See* sources cited *supra* note 35 (discussing the methodological failings of the Survey).

³⁹ *See* Gary Brown, *NCAA Executive Committee Urges Against Title IX Compliance Option*, NCAA News, May 9, 2005, <http://fs.ncaa.org/Docs/NCAANewsArchive/2005/index.html> (follow "Association-wide" hyperlink; then scroll to "May 9, 2005 5:30:01 PM"; then follow hyperlink bearing article title).

⁴⁰ *See* Press Release, NCAA, In Honor of Title IX Anniversary NCAA Urges Department of Education to Rescind Additional Clarification of Federal Law (June 22, 2005), *available at* <http://fs.ncaa.org/Docs/PressArchive/2005/Announcements/index.html> (scroll to "June 22, 2005 5:04:51 PM"; then follow hyperlink bearing press release title).

Whereas the U.S. Department of Education, without notice or opportunity for public input, issued an 'Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—Prong Three' on March 17, 2005. . . .

Now, therefore, be it resolved that:

- (1) NCAA members are urged to decline use of the procedures set forth in the March 17, 2005, Additional Clarification and abide by the standards of the 1996 Clarification to evaluate women's interest in sports under the third prong of the three-part test, which standards anticipate the use of a multiplicity of tools and analyses to measure that interest;
- (2) The NCAA Executive Committee, on behalf of its members, urges the Department of Education and federal policymakers to rescind the Additional Clarification and to honor the Department's 2003 commitment to strongly enforce the standards of long-standing Title IX athletics policies, including the 1996 Clarification.

Id.

⁴¹ *See* Press Release, U.S. Department of Education, Vice President Biden Announces Strengthening of Title IX (April 10, 2010), *available at* <http://www2.ed.gov/news/pressreleases/2010/04/04202010a.html>. For an explanation of the various prongs for demonstrating compliance, *see supra* note 2.

The chronology above suggests a lot of squabbling between women and men's Olympic sports over scarce resources within athletics. But these two groups could be natural allies, working to preserve the educational mission of athletics. There are participation problems within intercollegiate athletics, and it will take herculean efforts to surmount them. As other commentators have noted, the infighting serves neither: "Because they spend much of their time and energy fighting each other for scraps left over from men's revenue sports, proponents of men's non-revenue sports and women's sports are overlooking the fact that they could be valuable allies in shaping the evolution of Title IX in college athletics."⁴²

II. BUDGET TRENDS, ATHLETICS PARTICIPATION, AND TITLE IX COMPLIANCE

Empirical research has confirmed that in the wake of Title IX, institutions of higher education have responded by increasing women's participation rather than by decreasing men's participation.⁴³ Despite the existence of heavily publicized instances when a team has been discontinued,⁴⁴ both women's and men's collegiate sports participation opportunities are actually increasing.⁴⁵ A 2009 report found that there were 412,768 NCAA student-athletes participating in collegiate sports—57.4% male and 42.6% female.⁴⁶ The average number of student-athletes per

⁴² Ronnie Wade Robertson, *Tilting at Windmills: The Relationship Between Men's Non-Revenue and Women's Sports*, 76 Miss. L.J. 297, 297 (2006); see B. David Ridpath et al., *Changing Sides: The Failure of the Wrestling Community's Challenges to Title IX and New Strategies for Saving NCAA Sport Teams*, 1 J. INTERCOLLEGIATE SPORT 255, 278 (2008).

⁴³ See JOHN CHESLOCK, WOMEN'S SPORTS FOUNDATION, WHO'S PLAYING COLLEGE SPORTS? TRENDS IN PARTICIPATION 3 (2007), available at <http://www.womenssportsfoundation.org/Content/Research-Reports/Whos-Playing-College-Sports.aspx> (follow "Download Report" hyperlink); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-535, INTERCOLLEGIATE ATHLETICS: RECENT TRENDS IN TEAMS AND PARTICIPANTS IN NATIONAL COLLEGIATE ATHLETIC ASSOCIATION SPORTS 2 (2007), available at <http://www.gao.gov/new.items/d07535.pdf>.

⁴⁴ See *supra* notes 25–26 and accompanying text. The College Sports Council is one group dedicated to "reforming" Title IX: "The CSC is the leading organization working for reform of Title IX regulations that have led to the widespread elimination of opportunities for male athletes." See *About Us*, C. SPORTS COUNCIL, <http://www.savingsports.org/about/> (last visited Feb. 19, 2011).

⁴⁵ See ERIN ZGONG, NCAA, 1981–82–2008–09 NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 7 (2010), available at <http://www.ncaapublications.com/productdownloads/PR2010.pdf>.

⁴⁶ DENISE M. DEHASS, NCAA, 1981–82–2007–08 NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 5 (2009), available at <http://www.ncaapublications.com/productdownloads/PR2009.pdf>.

school was 232 for men and 168 for women.⁴⁷ Since the 1990–1991 academic year, female teams increased by 2268, whereas male teams went up by 273.⁴⁸ High school boys and girls participation figures also reached respective all-time highs in 2009–2010 with 4,455,740 boys and 3,172,637 girls.⁴⁹

One curious arena exists where men's sports teams are declining: the Division I level. This division has the most money, yet has the smallest percentage of students participating in its college athletics programming.⁵⁰

Net Change in Sports Sponsorship 1998–1999 to 2007–2008 ⁵¹		
Division	Men's Teams	Women's Teams
Overall	+365	+1205
Division I	–154	+261
Division II	+211	+455
Division III	+308	+490

This trend is counterintuitive. Big-budget athletics departments are able to offer a *greater* number of sports programs for men and women. Large universities have the greatest unmet demand for sports participation by men and women.⁵² This begs the question of why the largest universities with the biggest budgets offer relatively few opportunities to men and women. The data suggest that these schools are choosing to put more money into men's basketball and football, even if doing so shifts money away from women's sports and men's Olympic sports.⁵³

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See Press Release, National Federation of State High School Associations, High School Sports Participation Tops 7.6 Million, Sets Record (Sept. 8, 2010), *available at* <http://www.nfhs.org/content.aspx?id=4208>.

⁵⁰ Net Change in Sports Sponsorship 1998–1999 to 2007–2008 (2010) (unpublished data compilation) (on file with author).

⁵¹ Chart courtesy of the NCAA, collected from the NCAA Sports Sponsorship and Participation Rates website, <http://www.ncaapublications.com/Uploads/PDF/ParticipationRates2009c2f40573-60aa-4a08-874d-1aff4192c5e4.pdf>.

⁵² See *infra* notes 61–65 and accompanying text.

⁵³ See Robertson, *supra* note 42, at 308–09; *infra* notes 61–65 and accompanying text; see also Ridpath et al., *supra* note 42, at 267–68.

A. Budget Trends in Division I Universities

1. Division I Universities Have the Nation's Biggest Budgets

As an example of the high-budget-low-sports-participation phenomenon, consider the University of Florida (UF), Florida's flagship university. UF has an annual budget of \$95 million⁵⁴ for just 547 athletes.⁵⁵ This translates into spending a whopping \$173,674.59 per athlete per year. The membership of the Southeastern Conference (SEC), which includes UF, spent an average of \$144,592 per athlete in 2008.⁵⁶ The SEC average spending per student is just \$13,410, which makes the per athlete spending 10.8 times higher than institutional spending per student.⁵⁷ Yet UF found it necessary to cut its men's wrestling program in 1979.⁵⁸ It is at rich schools, like UF, where men's Olympic sports participation opportunities are being cut. Similarly, the University of California at Berkeley spends \$77,181 per athlete,⁵⁹ but recently cut two men's sports (and two women's sports).⁶⁰

⁵⁴ See Joe Drape & Katie Thomas, *As Athletic Directors Compete, Big Money Flows to All Sports*, N.Y. TIMES, Sept. 3, 2010, at A1, available at http://www.nytimes.com/2010/09/03/sports/03cup.html?_r=1.

⁵⁵ *The Equity in Athletics Data Analysis Cutting Tool*, U.S. DEP'T OF EDUC., <http://www.ope.ed.gov/athletics> (follow "Get data for one institution" hyperlink; then search "University of Florida" in "Name of Institution" text box) (last visited Feb. 20, 2011) (data submitted by the University of Florida pursuant to requirements of the Equity in Athletics Disclosure Act (EADA)). For more information regarding the EADA, see *infra* note 94.

⁵⁶ See KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, *RESTORING THE BALANCE: DOLLARS, VALUES, AND THE FUTURE OF COLLEGE SPORTS* 5 (2010), available at http://www.knightcommissionmedia.org/images/restoring_the_balance_2010.pdf.

⁵⁷ See COLLEGE SPORTS 101, *supra* note 3, at fig.2.

⁵⁸ See Mike Finn, *Bright Sons: Second Generation of Florida Wrestlers Taking Over for Displaced Fathers*, WIN MAG., Aug. 11, 2004, <http://www.win-magazine.com/Archives/v10%20archives/V10I11/floridasons.html>.

⁵⁹ *The Equity in Athletics Data Analysis Cutting Tool*, *supra* note 55 (follow "Get data for one institution" hyperlink; then search "University of California-Berkeley" in "Name of Institution" text box) (last visited Feb. 20, 2011) (data submitted by the University of California at Berkeley pursuant to requirements of the EADA) (listing a total budget of \$69,034,737 and 894 total athletes before the university cut five teams). For more information regarding the EADA, see *infra* note 94.

⁶⁰ See Josh Keller, *Berkeley Will Eliminate 5 Teams After Faculty Outcry Over Athletics Subsidy*, CHRON. OF HIGHER EDUC., Sept. 28, 2010, <http://chronicle.com/article/Berkeley-Will-Eliminate-5/124640/>.

2. Division I Universities Have Some of the Lowest Student-to-Athlete Ratios

Many Division I schools also offer only a tiny fraction of their students a sports experience, in contrast to high schools, whose sports participation percentages hover around 50%.⁶¹ UF's 547 athletes are part of a larger university of 31,133 students, which means that just 1.7% of the student body may participate in college athletics.⁶² The University of Texas has 35,107 students and just 560 athletes comprising 1.6% of the student body.⁶³ Similarly, Ohio State provides sports to just 2.5% of its student body.⁶⁴ Given the 50% participation rate in high school sports, to say that these universities have enormous unmet demand for sports participation is putting it mildly. Virtually any sport that UF might decide to offer for either men or women would fill up quickly, particularly when coupled with the lucrative athletics scholarships offered by Division I universities.⁶⁵ Particularly, sports that are not offered in high school, such as X Games sports, winter sports in Southern schools, water sports for landlocked schools, and popular European sports, would all find athletes at these schools. The rationale for dropping men's Olympic sports cannot be attributed to decreased demand for sports for either men or women. Instead, other budget trends that are unique to Division I, discussed below, account for this unusual phenomenon. Women's sports and men's Olympic sports should, therefore, be allies in combating this trend.

⁶¹ See Press Release, National Federation of State High School Associations, *supra* note 49 ("Based on the survey, 55.1 percent of students enrolled in high schools participate in athletics . . .").

⁶² See *The Equity in Athletics Data Analysis Cutting Tool*, *supra* note 55 (follow "Get data for one institution" hyperlink; then search "University of Florida" in "Name of Institution" text box).

⁶³ *Id.* (follow "Get data for one institution" hyperlink; then search "University of Texas" in "Name of Institution" text box) (last visited Feb. 20, 2011) (data submitted by the University of Texas pursuant to requirements of the EADA). For more information regarding the EADA, see *infra* note 94.

⁶⁴ *The Equity in Athletics Data Analysis Cutting Tool*, *supra* note 55 (follow "Get data for one institution" hyperlink; then search "Ohio State University" in "Name of Institution" text box) (last visited Feb. 20, 2011) (data submitted by Ohio State University pursuant to requirements of the EADA). For more information regarding the EADA, see *infra* note 94.

⁶⁵ Again, this is particularly true given that so many students participate in sports at the high school level; if the opportunity were available, most of them would likely choose to continue to participate at the university level. See *2009–10 High School Athletics Participation Survey*, NAT'L FEDERATION OF STATE HIGH SCH. ASS'NS, <http://www.nfhs.org/content.aspx?id=3282&linkidentifier=id&itemid=3282> (follow "2009–10 High School Athletics Participation Survey" hyperlink) (last visited Mar. 18, 2011).

B. Revenues and Expenses in Division I Overall

NCAA Division I spending has been on an upward trajectory since the effects of the U.S. Supreme Court's 1984 ruling in *Board of Regents of the University of Oklahoma v. NCAA* began to set in.⁶⁶ In 2001, former NCAA President Cedric Dempsey reported in a State of the Association address that rising revenues generated from intercollegiate athletics were being "overwhelmed by even higher costs."⁶⁷ Mr. Dempsey reported that the 2001 revenues and expenses report would show that the number of programs in Division I-A (DIA) that had revenues remaining was dwindling, and that the average deficit for the others had increased from \$3.3 million to \$3.8 million.⁶⁸

Mr. Dempsey's cautions have gone unheeded; indeed, the trend toward record deficits is accelerating, especially during current recessionary times. After correcting for inflation, overall spending on athletics has increased by roughly seven percent annually over the past ten years, over four times the rate of the general educational budget.⁶⁹ As many have pointed out, considerable reason exists to suspect that even these numbers might not accurately reflect the total losses sustained; as just one example, capital replacement costs for new stadiums and facilities are not included in DIA athletic department expenses—in 2005, these expenses were estimated to average a whopping \$24 million per institution.⁷⁰ Although individual schools are not identified in NCAA economic data, some athletic department finances are public. UC Berkeley, for example, reported losing between \$7.4 and \$13.5 million annually from 2003 to 2010, costing the university a total of \$78.1 million over this time period.⁷¹ These losses did not include the debt ser-

⁶⁶ See 468 U.S. 85, 88 (1984) (ruling that the NCAA's television plan with respect to football programming was illegal price-fixing); see also Alfred Dennis Mathewson, *By Education or Commerce: The Legal Basis for the Federal Regulation of the Economic Structure of Intercollegiate Athletics*, 76 UMKC L. REV. 597, 617–18 (2008); Matthew Mitten et al., *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 SAN DIEGO L. REV. 779, 831 (2010); Robertson, *supra* note 42, at 320–21.

⁶⁷ See Staurowsky, *supra* note 22, at 112.

⁶⁸ See *id.* at 110.

⁶⁹ DANIEL FULKS, NCAA, 2004–06 NCAA REVENUES AND EXPENSES OF DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS 7 (2008), available at <http://www.ncaapublications.com/productdownloads/RE2008.pdf>; COLLEGE SPORTS 101, *supra* note 3, at 10.

⁷⁰ JONATHAN M. ORSZAG & PETER R. ORSZAG, THE EMPIRICAL EFFECTS OF COLLEGIATE ATHLETICS: AN UPDATE 3 (2005), available at <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Research/Finances+of+Intercollegiate+Athletics> (follow hyperlink bearing report title).

⁷¹ See *Intercollegiate Athletics*, UC BERKLEY BUDGET CRISIS (July 3, 2009, 11:52 AM), http://budgetcrisis.berkeley.edu/?page_id=16.

vice specifically for the athletics department, including the \$321 million renovation of Memorial Stadium and the \$136 million Student Athlete High Performance Center.⁷² Despite these dire budget numbers, some blamed Title IX when Berkeley cut three men's sports and two women's sports earlier this year.⁷³ In its 2009 study, *College Sports 101*, the Knight Commission on Intercollegiate Athletics concluded that "no matter what the size of the athletic department, over the last decade expenditures have been rising dramatically every year and much faster than revenue is growing."⁷⁴

This trend—a net loss of men's sports solely in the smallest division with the most money and lowest per-student sport programs—was the subject of a 2003 law review article co-written by Daniel Marburger, an economist at Arkansas State, and the author. We argued that other factors account for cuts to men's Olympic sports besides Title IX in Division I.⁷⁵ For instance, athletic directors in Division I are financially rewarded with larger salaries and bonuses when their department's football and men's basketball teams are successful.⁷⁶ We stated:

This analysis reveals why [blaming Title IX for cuts to men's Olympic sports] may be misplaced. As long as football and men's basketball budgets are essentially exempted from budgetary restraints, Title IX proportionality burdens are shifted to the nonrevenue sports. This begs the question: is Title IX responsible for a sport's discontinuation, or is it the incentive to favor the growth in the football/men's basketball budget? In answering this question, we should note that the net decrease in men's nonrevenue sports occurred only at the Division I level despite the fact that football and men's basketball are

⁷² See *id.*

⁷³ See, e.g., Emily Nassi, Editorial, *Title IX Fails to Achieve What It Originally Set Out to Do*, THE REVIEW (Univ. of Del., Newark, Del.), Nov. 23, 2010, <http://www.udreview.com/editorial/title-ix-fails-to-achieve-what-it-originally-set-out-to-do-1.1795221>; *Politicians' Top Ten Promises Gone Wrong with John Stossel* (Fox television broadcast Dec. 17, 2010), available at http://www.youtube.com/watch?v=ttC_d4nSq8s (citing UC Berkeley men's rugby coach Jack Clark as blaming Title IX, and airing UC Berkeley men's gymnastics coach Tim McNeil's statement that "I asked the athletic director, if I handed her a check right now for millions of dollars, would we be reinstated? And she just said, 'No.'"). Yet even with the cuts to men's and women's teams, Berkeley is still twelve percentage points away from proportionality. See Erin Buzuvis, *UC Berkeley Cuts Five Teams*, TITLE IX BLOG (Sept. 28, 2010, 7:05 PM), <http://title-ix.blogspot.com/2010/09/uc-berkeley-cuts-five-teams.html>.

⁷⁴ COLLEGE SPORTS 101, *supra* note 3, at 3–4.

⁷⁵ Daniel L. Marburger & Nancy Hogshead-Makar, *Is Title IX Really to Blame for the Decline in Intercollegiate Men's Non-Revenue Sports?*, 14 MARQ. SPORTS L. REV. 65, 83–86 (2003).

⁷⁶ See *id.*

frequently in a position to cross-subsidize the nonrevenue sports. At the Division III level, where the expenditures per participant are substantially more equal between “revenue” and nonrevenue sports, and also between men’s and women’s sports in general, the net change in the number of men’s sports is positive.

If the analysis provided in this study is correct, weakening the proportionality component of Title IX will not spare men’s nonrevenue sports at the Division I level. Rather, it will only serve to further accelerate the arms race, with men’s and women’s nonrevenue sports experiencing equivalent budgetary casualties.⁷⁷

The language supports the conclusion that Division I universities are cutting men’s Olympic sports to shift resources to other men’s sports. This Article expands on this identified source of tension between the educational mission of athletics and the profit motive. To further the point, the Article documents ways schools pull more resources from the women’s program in an effort to shift resources similarly into football and men’s basketball.⁷⁸ Men in Olympic sports should take heed; the same tactics currently applied to women’s sports are likely to be used in men’s Olympic sports, continuing the shift of resources into two men’s sports, football and basketball.

A recent case, *Biediger v. Quinnipiac University*, decided in 2010 by the U.S. District Court for the District of Connecticut, highlights the ways in which the transformation of an athletic department can occur.⁷⁹ In 2009, Quinnipiac University attempted to cut its women’s volleyball team from its sports offerings.⁸⁰ In an effort to keep the team, the volleyball players and coach sued the school, claiming that even if Quinnipiac counted all varsity volleyball players, the school was not in compliance with Title IX.⁸¹ What began as a routine Title IX athletics participation case ultimately revealed that the university played numerous nefarious counting games to keep the numbers of women’s teams

⁷⁷ *Id.* at 93 (internal citations omitted).

⁷⁸ This Article focuses on Quinnipiac University because of recent litigation that stemmed from its treatment of teams. *See generally* *Biediger v. Quinnipiac Univ. (Biediger II)*, 728 F. Supp. 2d 62 (D. Conn. 2010); *Biediger v. Quinnipiac Univ. (Biediger I)*, 615 F. Supp. 2d 277, 277 (D. Conn. 2009). Quinnipiac University did not have a football program, but it did concentrate resources into a few sports. *Biediger II*, 728 F. Supp. 2d at 71.

⁷⁹ *See generally* *Biediger II*, 728 F. Supp. 2d 62.

⁸⁰ *Id.* at 63.

⁸¹ *See id.*

low.⁸² The net effect was that women at Quinnipiac were not afforded the same educational experiences that men at Quinnipiac were provided.⁸³ These same tactics could just as easily be applied to men's teams, weakening the overall educational experience for all Olympic-sport athletes.

C. *Counting Games to Manage Costs: Fraudulent Reporting; Oversized Rosters; Triple-Counting Athletes; and Sponsoring Undeveloped Sports—Lessons for Olympic Sports from Biediger v. Quinnipiac University*

Quinnipiac University's⁸⁴ budget troubles began in earnest when it decided to move to Division I from Division II in 2006, a costly move for any school as the Knight Commission report details.⁸⁵ As part of the move, Quinnipiac opened a luxurious \$52 million sports center in January 2007.⁸⁶

⁸² See *id.* at 64, 110.

⁸³ See *id.* at 64, 113.

⁸⁴ In addition to the practices revealed in *Biediger*, legal maneuvers by defense attorneys to add considerable expense to plaintiffs' lawsuits have also worked their way through the courts recently. This Article does not discuss them in depth because the nexus between these defenses and men's Olympic sports are less obvious. For example, the U.S. Supreme Court in *Fitzgerald v. Barnstable School Committee* ruled that a Title IX suit does not bar § 1983 suits to enforce rights under the Equal Protection Clause. 129 S. Ct 788, 797 (2009). In addition, in 2010, in *Mansourian v. Regents of the University of California*, the U.S. Court of Appeals for the Ninth Circuit overturned a district court's decision to dismiss a Title IX claim because "notice and an opportunity to cure a violation is an essential precursor to a sexual harassment suit for damages under Title IX." 602 F.3d 957, 966 (9th Cir. 2010). The Ninth Circuit distinguished a Title IX athletics case from a case alleging sexual harassment, and concluded that "[a]thletic programs that fail effectively to accommodate students of both sexes thus represent 'official policy of the recipient entity' and so are not covered by [the] notice requirement." *Id.* at 968. Moreover, the Ninth Circuit noted that a notice requirement would be particularly inappropriate given universities' continuing obligations to certify their programs for Title IX compliance under NCAA and EADA requirements. *Id.* at 961, 966. For these reasons, it concluded that "pre-litigation notice and opportunity to cure are not necessary in cases alleging unequal provision of athletic opportunities in violation of Title IX." *Id.* at 968. These legal maneuvers extend what should be routine Title IX claims.

⁸⁵ See COLLEGE SPORTS 101, *supra* note 3, at 3–4.

⁸⁶ The women's volleyball team was prohibited from practicing on the sports center facility. See Sarah Gibbard Cook, *How Not to Cheat Women in Athletics Under Title IX*, WOMEN HIGHER EDUC., Sept. 2010, at 7 available at <http://wihe.com/displayNews.jsp?id=28528> ("Quinnipiac's luxurious \$52 million TD Bank Sports Center opened in January 2007 with separate spaces for ice hockey and basketball. The volleyball team wasn't allowed to practice on the basketball court to protect the floor."); Lisa Prevost, *School Colors: Green and Greener*, N.Y. TIMES, Nov. 8, 2009, at A8, available at <http://www.nytimes.com/2009/11/08/realestate/08wczo.html> ("The university's TD Banknorth Sports Center, a \$60 million *hockey* and *basketball* facility that opened almost three years ago, was built into the natural slope

In addition to carrying the large debt service on the new facilities, Quinnipiac committed to complying with Prong 1 under Title IX's three-prong test,⁸⁷ and the school had just thirty-seven percent male enrollment.⁸⁸ Division I requires that schools in this top, elite division keep at least fourteen sports, with at least six of those fourteen sports for men.⁸⁹ To demonstrate how this puts pressure on the athletics department, assume each team has twenty athletes, and the school must maintain at least six teams for men. Six teams at twenty athletes each would require Quinnipiac to field 120 male athletes. To comply with the substantial proportionality prong it chose, Quinnipiac would have to provide 204 women with sports opportunities, or between ten and eleven teams—an unlikely outcome. Of course, this example is cramped; team size varies widely between sports, anywhere from five on a golf team to 120 on a men's football team. This example is merely intended to illustrate the cost implications of requiring a minimum number of male teams at a school with a small percentage of men when the school moves to Division I. Clearly, Quinnipiac needed to expand its athletic department significantly as part of its decision to move to Division I.

1. Counting Athletes

The manner in which athletes are counted is also a fertile field for manipulation. The 1979 Policy Interpretation explains that “counted” athletes are those participants:

- (a) Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved (e.g., coaching, equipment, medical and training room services) on a regular basis during a sport's season; and
- (b) Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
- (c) Who are listed on the eligibility or squad lists maintained for each sport; or

of the land to save on heating and cooling costs.”) (emphasis added)); *see also Biediger I*, 616 F. Supp. 2d at 288.

⁸⁷ *See* Title IX Policy Interpretation, *supra* note 2. For a description of the three-prong test, *see supra* note 2.

⁸⁸ *See Biediger II*, 728 F. Supp. 2d at 64.

⁸⁹ NCAA OPERATING BYLAWS art. 20.9, in DIVISION I MANUAL (2010), available at <http://www.ncaapublications.com/productdownloads/D111.pdf>.

(d) Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.⁹⁰

The Department of Education's Office for Civil Rights (OCR) has adopted this definition to determine the number of athletic participation opportunities provided for purposes of Prong 1.⁹¹ This fact-specific inquiry was conducted in 2010 by the U.S. District Court for the District of Connecticut in *Biediger v. Quinnipiac University*.⁹² Specifically, the court considered the athletics department's decision to deal with its budget constraints by getting cost savings from its existing athletes.⁹³

2. Fraud in EADA Reporting

During the preliminary injunction hearing in *Biediger*, the plaintiffs demonstrated how Quinnipiac had manipulated the data it submitted pursuant to the Equity in Athletics Disclosure Act (EADA)⁹⁴ rather than provide women with comparable athletic opportunities.⁹⁵

At the preliminary injunction stage, the district court found that Quinnipiac had indeed manipulated rosters to expand its reportable numbers by adding female athletes just prior to the date of first competition and then subtracting them just afterwards.⁹⁶ After the first competition, Quinnipiac would cut superfluous female athletes to produce a more manageable roster size.⁹⁷ These athletes remained on the EADA reported forms even after they were dismissed, and other female

⁹⁰ See Title IX Policy Interpretation, *supra* note 2.

⁹¹ See "Dear Colleague" Letter from OCR, U.S. Dep't of Educ. (Jan. 16, 1996) ("Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test"), available at <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

⁹² See *Biediger II*, 728 F. Supp. 2d at 64–88, 94–110.

⁹³ See *id.*

⁹⁴ 20 U.S.C. § 1092 (2006). The EADA requires co-ed schools receiving federal funds and participating in intercollegiate athletics to submit an annual report to the U.S. Department of Education. See *id.* The report contains information about the school's undergraduate enrollment as broken down by gender, and the number and different sports played listed by gender, among other required data. See *id.* As the district judge explained in the preliminary hearing for *Biediger*, its significance lies in the fact that EADA numbers are not updated throughout the course of the season: "[T]he EADA numbers are not updated over the course of the season to reflect additions to or cuts from the varsity rosters compiled as of the first day of competition." *Biediger I*, 616 F. Supp. 2d at 283.

⁹⁵ See *Biediger I*, 616 F. Supp. 2d. at 295 ("[T]he record demonstrates that Quinnipiac will not likely satisfy prong one of Title IX compliance due to problems with its roster management policy and its reliance on setting roster floors for women's teams.").

⁹⁶ *Id.* at 284.

⁹⁷ *Id.* at 285.

athletes remained on the roster after they had quit—even if they quit prior to the first competition.⁹⁸ In these ways, Quinnipiac manipulated its EADA female participation numbers to artificially conflate the numbers of females participating on sports teams.⁹⁹

Quinnipiac also manipulated the participation numbers for men's teams, but in the opposite way:¹⁰⁰ the school would drop male athletes from rosters prior to the date of their first competition so that those athletes would not be counted on the EADA and official rosters, and then would add those athletes back on after the first day of competition. For example, the men's lacrosse team "deleted" six players before reporting the squad list, and then, one week later, the coach added those same six players back to the roster.¹⁰¹ In addition, Quinnipiac intentionally kept male athletes out of the first game and did not add them to the team roster until the next week.¹⁰² Again, Quinnipiac engaged in these practices to make it appear that their numbers conformed to statutory requirements. In its order granting the plaintiffs a preliminary injunction, the district court found that Quinnipiac had engaged in this practice of false reporting at least through 2008–2009.¹⁰³

3. Larger Squad Sizes for Women, Smaller Squad Sizes for Men

Prior to Quinnipiac's requirement that coaches carry a specific target number of athletes, the softball coach, Germaine Fairchild, testified that she typically carried sixteen to eighteen players on her team.¹⁰⁴ Before the start of the 2007–2008 season, the athletic director notified her that she would be required to take at least twenty-five players on her team.¹⁰⁵ The court noted:

Fairchild raised her concerns about her roster management targets to both [athletic director Jack] McDonald and [Senior Women's Administrator and Assistant Athletic Director for Compliance Tracy] Flynn, explaining that her budget and coaching resources were only enough to support a team of 16–18 athletes and she could not provide a "legitimate Division I

⁹⁸ *See id.*

⁹⁹ *See id.* at 284–86.

¹⁰⁰ *Id.* at 284.

¹⁰¹ *Biediger I*, 616 F. Supp. 2d at 284.

¹⁰² *Id.*

¹⁰³ *Id.* at 297.

¹⁰⁴ *Id.* at 285.

¹⁰⁵ *Id.*

experience” to so many people. Nevertheless, Fairchild’s budget remained static¹⁰⁶

In addition, Fairchild testified that no one had consulted with her about whether twenty-five was a realistic number of athletes for the softball team.¹⁰⁷ Such a large squad size was both a challenge and a strain on budget resources. The court referenced her testimony and explained:

For example, during the off-season, under NCAA regulations, softball players are permitted to practice for 8 hours a week, with two hours devoted to skills training and six hours to strength and conditioning. At Quinnipiac, those two skills-training hours are spent one-on-one with Fairchild. Fairchild testified that 50 hours a week of individual time with her student-athletes, combined with office work and all the other tasks required to run a Division I program, would have strained her coaching resources beyond her capabilities. Fairchild did not receive any increase in budget, extra equipment, additional assistant coaches, or a raise in salary to account for and/or accommodate the extra players.¹⁰⁸

After these practices were criticized by the district court at the preliminary injunction, Dr. Mark Thompson, the Senior Vice President for Student and Academic Affairs, developed a set of preliminary roster targets based on Quinnipiac’s roster sizes in 2008–2009, NCAA average squad sizes, and the teams’ operating and scholarship budgets.¹⁰⁹ At trial, however, defendants “did nothing more than put forward those opening day roster numbers for the purpose of demonstrating [their] compliance with Title IX.”¹¹⁰ The court found that, “with the exception of women’s volleyball, indoor track, and outdoor track, every Quinnipiac varsity women’s team was larger than the national average Division I women’s team. Quinnipiac’s teams were larger than the national average by approximately one to four players.”¹¹¹ The court also found that women’s average squad sizes were above conference averages. By contrast, roster sizes for men were generally below both NCAA and conference sizes.¹¹²

¹⁰⁶ *Id.*

¹⁰⁷ *See Biediger I*, 616 F. Supp. 2d at 285.

¹⁰⁸ *Id.* at 285–86.

¹⁰⁹ *See Biediger II*, 728 F. Supp. 2d at 65.

¹¹⁰ *See id.* at 66.

¹¹¹ *See id.* at 72.

¹¹² *See id.* at 73.

The court concluded that when schools count male and female athletes differently, and when they require different squad sizes for men and women in this way, they explicitly breach the purpose and intent of Title IX: by definition, they are discriminating on the basis of sex.¹¹³ By manipulating the numbers, Quinnipiac attempted to avoid adding new women's sports and thereby ostensibly to limit women's athletic participation opportunities.

4. Requiring Female Athletes to Participate on More Than One Team

As described above, the OCR regulations allow schools to "count" a single athlete more than once if that athlete competes on more than one team.¹¹⁴ The regulations contemplate a two- or three-sport athlete, competing during different seasons. For example, an athlete may participate in soccer in the fall, basketball in the winter, and softball in the spring. These are three separate sports and three legitimate "spots" on a team that the school is providing for women, even though one athlete is fulfilling all three spots. But Quinnipiac abused this rule by requiring long distance runners to participate on three teams—cross country as well as indoor and outdoor track.¹¹⁵ Ironically, Quinnipiac did not even have a track facility.¹¹⁶ Track consists of a variety of different events, such as throwing, sprinting, jumping, hurdles, and long distance events. Quinnipiac athletes had no equipment or opportunity for the many other events.¹¹⁷ Instead, the same athletes competed in all three running events.¹¹⁸ All of the women's cross-country runners participated on the indoor and outdoor track teams.¹¹⁹ "In other words, [sixty] percent of the indoor and outdoor track teams consisted of athletes who ran cross country in the preceding fall season."¹²⁰

Eliminating men's indoor and outdoor track teams did not materially change the experience of the male track athletes; they still competed during the indoor and outdoor seasons, just under a club team name.¹²¹ Although the numbers of women participating on "all track combined"—seventy-eight women, according to Quinnipiac's most re-

¹¹³ See *Biediger I*, 616 F. Supp. 2d at 294.

¹¹⁴ See *supra* notes 90–93 and accompanying text.

¹¹⁵ See *Biediger II*, 728 F. Supp. 2d at 78.

¹¹⁶ See *id.* at 75.

¹¹⁷ See Cook, *supra* note 86, at 7.

¹¹⁸ *Biediger II*, 728 F. Supp. 2d at 64.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 75.

¹²¹ Cook, *supra* note 86, at 7.

cent EADA form—appear unusually high,¹²² only a few more women than men had the opportunity to participate. If this practice were adopted at the Division I level, colleges and universities could similarly require men to participate in more than one sport in order to comply with the minimum number of sports requirement.

5. Adding Undeveloped Sports

Finally, Quinnipiac attempted to start a new sport for women, competitive cheer, in an attempt to dramatically lower the per-athlete cost of running a women's team.¹²³ Professor Erin E. Buzuvis describes how this attempt deprived women of a varsity sports experience and how the future of competitive cheer will inevitably lead to varsity status.¹²⁴ This Article provides an abbreviated list of problems associated with adopting an undeveloped sport that could also translate to men's Olympic programming.

First, the parties stipulated that, since 2000, OCR has never recognized an intercollegiate varsity cheerleading program to be a sport for Title IX purposes.¹²⁵ Second, the competitive cheer at Quinnipiac lacked structure because the athletes had no one set of rules that applied during the season.¹²⁶ Third, because only six varsity programs existed in the entire country, no other competitors existed for the competitive cheerleaders to compete against, in part because it was not yet sanctioned by the NCAA on its emerging sports list.¹²⁷ The competitive cheer program therefore failed to meet “[t]wo basic features of any other collegiate varsity program . . . the application of a uniform set of

¹²² *The Equity in Athletics Data Analysis Cutting Tool*, *supra* note 55 (follow “Get data for one institution” hyperlink; then search “Quinnipiac University” in “Name of Institution” text box) (last visited Feb. 20, 2011) (data submitted by Quinnipiac University pursuant to requirements of the EADA).

¹²³ See *Biediger II*, 728 F. Supp. 2d at 78.

¹²⁴ See Erin E. Buzuvis, *The Feminist Case for the NCAA's Recognition of Competitive Cheer as an Emerging Sport for Women*, 52 B.C. L. REV. 439, 459–64 (2011).

¹²⁵ See *Biediger II*, 728 F. Supp. 2d at 92. OCR has three times issued guidance on whether activities such as cheerleading count as sports for Title IX purposes: first, in April 2000, see Letter from Mary Frances O'Shea, Nat'l Coordinator for Title IX Athletics, OCR, U.S. Dep't of Educ., to David V. Stead, Exec. Dir., Minn. State High Sch. League 53 (Apr. 11, 2000); second, in May 2000, see Letter from Mary Frances O'Shea, Nat'l Coordinator for Title IX Athletics, OCR, U.S. Dep't of Educ., to David V. Stead, Exec. Dir., Minn. State High Sch. League (May 24, 2000); and third, in September 2008, see Letter from Stephanie Monroe, Ass't Sec'y for Civil Rights of the Dep't of Educ. (Sept. 17, 2008), which is available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html>.

¹²⁶ See *Biediger II*, 728 F. Supp. 2d at 97.

¹²⁷ See *id.* at 78–79.

rules for competition and the restriction of competition to contests against other varsity opponents.”¹²⁸ Finally, the cheer program did not (and could not due to its late start date) engage in any off-campus recruitment during the season; all athletes were recruited from the existing student body.¹²⁹ The court held that the lack of recruiting “mark[ed] a significant departure from what would be expected of any other competitive Division I varsity team.”¹³⁰

Thus the Quinnipiac ruling is important because of the deceptive practices that were revealed: cutting (men) and adding (women) athletes around the date of first competition; requiring coaches to keep women’s teams super-sized while requiring men’s coaches to keep their squad lists low; requiring women to compete on multiple teams; and starting new, cheaper teams for women.¹³¹ These ploys are far from isolated occurrences. In reviewing EADA reports, one quickly discerns a pattern of female—but not male—multi-sport athletes being duplicated in the final athlete tallies.¹³² The NCAA reports that women account for forty-two percent of all athletes, but collectively, these practices paint a far worse picture of women’s athletics than the official NCAA-reported numbers would indicate.¹³³ Whereas Quinnipiac’s roster management practices accounted for a difference of forty-one athletes

¹²⁸ See *id.* at 99–100.

¹²⁹ See *id.* at 99.

¹³⁰ See *id.* The court was careful not to disparage the sport of cheerleading; the court stated that the same analysis would have applied for any new, undeveloped sport:

In deciding that competitive cheer is not presently a Title IX sport, I do not mean to minimize the experience shared by the Quinnipiac competitive cheer team. It is unquestionable that the Quinnipiac competitive cheer members engaged in meaningful efforts and activities during the 2009–10 season—efforts and activities that this decision cannot diminish or take away. But what those students experienced was not the genuine opportunity to participate on a varsity team, which is the standard for counting athletes under Title IX. In reaching my conclusion, I also do not mean to belittle competitive cheer as an athletic endeavor. Competitive cheerleading is a difficult, physical task that requires strength, agility, and grace. I have little doubt that at some point in the near future—once competitive cheer is better organized and defined, and surely in the event that the NCAA recognizes the activity as an emerging sport—competitive cheer will be acknowledged as a bona fide sporting activity by academic institutions, the public, and the law. As the evidence in this case demonstrates, however, that time has not yet arrived.

Id. at 101.

¹³¹ See *supra* notes 90–130 and accompanying text.

¹³² See sources cited *supra* notes 55, 59, 62–64 and accompanying text.

¹³³ See 1981–82–2008–09 NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT, *supra* note 45, at 5.

after the worst abuses were halted (after a hearing on the preliminary injunction), another school's roster management would deny ninety-two female athletes sports opportunities.¹³⁴

III. A WARNING TO MEN'S OLYMPIC SPORTS: PAY ATTENTION TO THESE TRENDS

The economic pattern in collegiate sports favoring two men's sports, along with the trend of using "roster management" techniques to meet Title IX requirements artificially, presents a stark warning sign for Olympic sports including men's teams.

In 2009, the Knight Foundation polled Football Bowl Subdivision (FBS) member presidents about the spending trends in their athletic programming.¹³⁵ Three-quarters of presidents supported reducing the level of financial commitment required for FBS membership.¹³⁶ The survey did not specify which NCAA bylaws presidents would modify to reduce this commitment, but many membership requirements ensure that collegiate athletic departments do not wither to just football, men's basketball, and a handful of other sports.¹³⁷ For example, NCAA Bylaw 20.9 requires Division I FBS schools to sponsor at least sixteen sports.¹³⁸ NCAA Bylaw 20.9.7.4(b) requires FBS members to provide an average of at least two hundred athletics scholarships or expend at least \$4 million dollars on athletic scholarships.¹³⁹

Given these bylaws, university presidents revealed they are currently considering taking resources from men's and women's Olympic sports, the so-called "have-nots" from within the athletic departments, as a way to cope with the unsustainable spending in football and men's basketball.¹⁴⁰ Without federal law requiring equity in educational opportunities for men and women and specific FBS membership requirements, further concentration of resources into the two men's sports could oc-

¹³⁴ See Division I Gender Equity Plan (2010) (on record with author).

¹³⁵ See KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, QUANTITATIVE AND QUALITATIVE RESEARCH WITH FOOTBALL BOWL SUBDIVISION UNIVERSITY PRESIDENTS ON THE COSTS AND FINANCING OF INTERCOLLEGIATE ATHLETICS: REPORT OF FINDINGS AND IMPLICATIONS I (2009) [hereinafter FBS PRESIDENTS SURVEY], available at http://www.knightcommissionmedia.org/images/President_Survey_FINAL.pdf; see also Rick Hesel & Amy Perko, *A Sustaining Model: University Presidents Assess the Costs and Financing of Intercollegiate Athletics*, 3 J. INTERCOLLEGIATE SPORT 1, 32 (2010).

¹³⁶ See FBS PRESIDENTS SURVEY, *supra* note 135, at 7; Hesel & Perko, *supra* note 135, at 42.

¹³⁷ See FBS PRESIDENTS SURVEY, *supra* note 135, at 14.

¹³⁸ See NCAA OPERATING BYLAWS, *supra* note 89, art. 20.9.7.1.

¹³⁹ See *id.* art. 20.9.7.4(b).

¹⁴⁰ See *supra* note 42 and accompanying text.

cur. These minimum numbers of teams and scholarships protect the entire department from further cuts to Olympic sports. If FBS presidents were successful in allowing member schools to reduce the required number of sports (to, for example, ten), it is likely that a school like Quinnipiac University would start cutting both men's and women's Olympic sports.

Moreover, the practice of adopting an undeveloped sport to save costs could apply to male and female athletes alike. The Florida High School Athletic Association (FHSAA) has approved flag football for girls; the sport is currently played only by girls in the southern region of the state.¹⁴¹ There is no club flag football, no collegiate flag football, and no Olympic flag football.¹⁴² For over ten years, flag football players in Florida alone have lost out on \$1.5 billion annually in college scholarships.¹⁴³ Meanwhile, the FHSAA has yet to sponsor other popular girls' sports, such as field hockey, crew, water polo, rugby, and archery. Florida has a particularly low student-athlete ratio: nationally, 50% of all high school students are provided with sports opportunities,¹⁴⁴ while Florida provides just 30% with sports opportunities, and only 41% goes to girls.¹⁴⁵ Because new, undeveloped sports tend to be cheaper sports, schools may be just as prone to favoring these sports for men as well as for women.

In addition, the NCAA may add sports to the emerging sports list that have a high duplication count. For example, current sideline cheerleaders could be coopted into "competing" via a one-minute routine during half time at a football game, a move that would cause competitive sports opportunities for women to contract, not expand. Beach volleyball could be added and pull from existing players. Sculling could

¹⁴¹ See Press Release, FHSAA, Board of Directors Approves Terms and Conditions for Inaugural State Championship Series in Boys Volleyball, Girls Flag Football; Adopts Policy to Interpret Two-Sports-Per-Season Bylaw (Feb. 4, 2002), *available at* <http://www.fhsaa.org/news/2002/0204>; see also Nancy Hogshead-Makar, Letter to the Editor, *Fair's Fair and Fun's Fun*, N.Y. TIMES, May 23, 2010, at SP10, *available at* http://www.nytimes.com/2010/05/23/sports/23inbox.html?_r=1&scp=4&sq=hogshead-makar&st=nyt; Katie Thomas, *No Tackling, but a Girls' Sport Takes Some Hits*, N.Y. TIMES, May 16, 2010, at A1, *available at* <http://www.nytimes.com/2010/05/16/sports/16flag.html>.

¹⁴² See *id.*

¹⁴³ See Letter from Myles Brand, NCAA President, to Rep. William Thomas, Chairman of House Ways & Means Comm. (Nov. 13, 2006). Brand wrote that colleges "provide \$1.5 billion annually in athletics scholarships to help pay the cost of education . . ." *Id.*

¹⁴⁴ See Press Release, National Federation of State High School Associations, *supra* note 49.

¹⁴⁵ See 2009–10 Sports Participation Survey, FHSAA, http://www.fhsaa.org/sites/default/files/orig_uploads/participation_surveys/2009_10.htm (last visited Feb. 19, 2011).

be added as a new sport, independent of rowing, rather than as an additional event on an existing team.¹⁴⁶ Many sports could be taken apart and counted as separate sports, similar to what Quinnipiac and other schools have done with indoor and outdoor track. Swimming's two seasons could be counted as two sports the way track and field counts its seasons as different sports. Swimming could also try to have its different strokes count as separate sports, similar to how sculling was added as independent of rowing. And, in the quest to move resources to a few men's sports, schools could do the same for men's Olympic sports.

CONCLUSION

The fates of women's sports and men's Division I sports are intertwined. Current economic trends in Division I athletics departments show a marked pattern of shifting resources to two men's sports that consume the lion's share of the overall budget, leaving women's sports and men's Olympic sports to share the remains. Title IX is more powerful for women when the men's overall sports programming is robust. Men's Olympic sports should be supportive of efforts to prohibit colleges and universities from engaging in disreputable athlete-counting practices and from providing some athletes with sub-par, "varsity-lite" sports experiences. It is only a matter of time before men's Olympic sports will be next to suffer the same fate.

¹⁴⁶ See *Bucknell Women's Rowing Hosts First-Ever Pennsylvania State Sculling Championships*, BUCKNELL BISON, Oct. 5, 2008, <http://www.bucknellbison.com/sports/c-rowing/spec-rel/100508aab.html> (reporting that Bucknell hosted the first-ever Pennsylvania State Sculling Championships, as separate from rowing).

